Supreme Court, U.S.
FILED
JUN 11 2001
CLERK

No. 00-1692

In the Supreme Court of the United States

WETLANDS ACTION NETWORK, *ET AL.*,

PETITIONERS,

V.

UNITED STATES ARMY CORPS OF ENGINEERS, *ET AL.*,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT PLAYA CAPITAL COMPANY, LLC'S BRIEF IN OPPOSITION

Maureen E. Mahoney
J. Scott Ballenger
LATHAM & WATKINS
555 Eleventh Street, N.W.
Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Facsimile: (202) 637-2201

Robert D. Crockett*
Kathleen O' Prey Truman
Kathryn M. Davis
LATHAM & WATKINS
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007
Telephone: (213) 485-1234
Facsimile: (213) 891-8763

* Counsel of Record for Respondent Playa Capital Company, LLC

QUESTION PRESENTED

Whether the Ninth Circuit erred by holding that, in light of the facts reasonably found by the U.S. Army Corps of Engineers, the Corps' application of its own regulations was not arbitrary and capricious.

STATEMENT OF RELATED PERSONS

Neither Playa Capital Company, LLC, nor its predecessor in interest, Maguire Thomas Partners-Playa Vista, has a parent company or has issued shares of stock or partnership interests to the public.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF RELATED PERSONS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

I. Procedural History 1

II. Factual Background 1

REASONS FOR DENYING THE WRIT 4

I. The Court of Appeals Merely Held That, in Light of the Facts Reasonably Found by the Corps, the Corps' Application of Its Own Regulations Was Not Arbitrary and Capricious 5

II. There is No Conflict With Decisions of This Court 8

III. There is No Conflict With Decisions of Other Circuits 11

IV. There is No Conflict With the Regulations 19

V. There is No Important Federal Question 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases

Airport Neighbors Alliance, Inc. v. United States,
90 F.3d 426 (10th Cir. 1996) 16

Colorado Environmental Coalition v. Dombeck,
185 F.3d 1162 (10th Cir. 1999) 14

Friends of the Earth, Inc. v. U.S. Army Corps of Engineers,
109 F. Supp. 2d 30 (D.D.C. 2000) 14

Fritiofson v. Alexander,
772 F.2d 1225 (5th Cir. 1985) 17

Kleppe v. Sierra Club,
427 U.S. 390 (1976) 11

Marsh v. Oregon Natural Resources Council,
490 U.S. 360 (1989) 8, 10

Mississippi River Basin Alliance v. Westphal,
230 F.3d 170 (5th Cir. 2000) 14

National Wildlife Federation v. Whistler,
27 F.3d 1341 (8th Cir. 1994) 18

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 8, 9, 10

Save the Bay, Inc. v. U.S. Army Corps of Engineers,
610 F.2d 322 (5th Cir. 1980) 7

Sierra Club v. Marsh,
769 F.2d 868 (1st Cir. 1985) 11, 12, 13

Sierra Club v. United States Forest Service,
46 F.3d 835 (8th Cir. 1995) 13

Society Hill Towers Owners' Ass'n v. Rendell,
210 F.3d 168 (3d Cir. 2000) 13

Sylvester v. U.S. Army Corps of Engineers,
884 F.2d 394 (9th Cir. 1989) 7, 16, 19

Sylvester v. U.S. Army Corps of Engineers,
882 F.2d 407 (9th Cir. 1989) 18

Vieux Carre Property Owners v. Pierce,
719 F.2d 1272 (5th Cir. 1983) 18

Winnebago Tribe of Nebraska v. Ray,
621 F.2d 269 (8th Cir. 1980) 7

Statutes and Regulations

33 C.F.R. Part 325, App. B § 7(b) ..... *passim*

33 C.F.R. Part 325, App. B § 7(b)(1) 3, 6

33 C.F.R. Part 325, App. B § 7(b)(2) 7, 9

40 C.F.R. § 1508.7 14

40 C.F.R. § 1508.8 14

40 C.F.R. § 1508.8(a) 14

40 C.F.R. § 1508.8(b) 14

40 C.F.R. § 1508.9 6

40 C.F.R. § 1508.13 6

40 C.F.R. § 1508.25 20

40 C.F.R. § 1508.25(a)(2) 17

40 C.F.R. § 1508.27(b)(7) 13

42 U.S.C. § 4321 et seq. 5
42 U.S.C. § 4332(2)(C) 6, 10

STATEMENT OF THE CASE

I. Procedural History

Maguire Thomas Partners-Playa Vista ("MTP-PV")[1] concurs with Petitioners Wetlands Action Network, et al.'s recitation of the Opinions Below and Jurisdiction. Petitioners' statement of the Constitutional and Statutory Provisions Involved fails to mention the controlling regulations of the U.S. Army Corps of Engineers, found at 33 C.F.R. Part 325, Appendix B § 7(b). The regulatory background and history of this case are accurately summarized, in relevant part, in the Court of Appeals' comprehensive opinion.

Since the Court of Appeals entered its opinion, Petitioners have filed several motions in the District Court and the Court of Appeals seeking various stays and injunctions pending this petition for certiorari, all of which have been denied. These motions are not strictly relevant to the issues presented here, but MTP-PV will discuss them in detail in its Opposition To Petitioners' Application For Rule 23 Stay Pending Petition For Certiorari, filed concurrently herewith.

II. Factual Background

MTP-PV concurs with the balanced summary of the relevant factual record contained in the Court of Appeals' opinion. MTP-PV takes exception to the factual

---

[1] Respondent Playa Capital Company, LLC is the successor-in-interest to Maguire Thomas Partners-Playa Vista. For clarity and consistency, the developer is referred to as MTP-PV.

presentation of the Petition, as described in the remainder of this section.

MTP-PV began carefully planning this mixed-use development of the Playa Vista property, which covers more than a thousand acres in Western Los Angeles County, in 1979. (Petition at 5a). The vast majority of the planned development will occur on upland property within the jurisdiction of state and local environmental regulators. MTP-PV has worked hard to accommodate the concerns identified by those regulators and the environmental impact reports they have prepared, and its initial plans have been approved by the California Coastal Commission and the City of Los Angeles. (*See Id.* at 6a n.4).

MTP-PV's development plans for the Playa Vista property also include filling a total of 24.1 acres of federally delineated wetlands, for which MTP-PV requires a permit from the U.S. Army Corps of Engineers (the "Corps") pursuant to Section 404 of the Clean Water Act. (*See id.* at 6a).

With the approval of the Corps, MTP-PV divided the planned project into three phases for purposes of that federal review. (Petition at 7a-8a). As part of the first phase, MTP-PV applied in 1991 for a permit to fill 16.1 acres of federally delineated wetlands in connection with a larger (entirely state-regulated) project for 5 million square feet of office space, 13,000 residential units, and hotel and retail space. (*Id.* at 8a & n.6). Eight of these acres are man-made flood control ditches and degraded wetlands located in seventeen isolated patches. (*Id.* at 8a). The remaining eight acres were abandoned farmland; four of those acres will be restored as wetlands, and the other four acres will be used to create a berm around a planned new 51.1-acre freshwater wetlands system (*id.*) to serve the dual function as

mitigation for loss of the scattered 16.1 acres, as well as to provide flood control. The second phase of the Playa Vista project plans to restore 188 acres of salt marsh. (*Id.* at 7a). The third phase plans a marina and related development. (*Id.*)

The Corps issued an Environmental Assessment ("EA") and a Finding of No Significant Impact ("FONSI"), in lieu of an Environmental Impact Statement ("EIS"). (*Id.* at 11a). The Corps found that the division of the project into three segments did not constitute inappropriate piecemealing. (*Id.*) The EA considered the cumulative impacts that the project would have on surrounding areas, but concluded that development of the 16.1 acres within the Corps' jurisdiction would have no significant impact and that there would be no significant loss of habitat. The Corps also concluded that it did not have "sufficient control and responsibility" over the upland portions of the project to warrant preparing a federal EIS on the basis of those state-regulated portions, pursuant to the Corps' governing regulations. *See* 33 C.F.R. Part 325, App. B § 7(b)(1).

MTP-PV did prepare a full environmental impact report under state law for the larger project. In 1993, objectors challenged the project within the 30-day limitations period of the California Environmental Quality Act. They raised the same claims Petitioners raise here as to the propriety of the freshwater wetlands system.

Petitioners' lengthy prediction of dire environmental harm from the Playa Vista development (Petition at 5-7) is both irrelevant to the issues actually presented in their Petition[2] and a one-sided portrayal of the extensive factual

---

[2] The Petition does not, for example, actually challenge the Corps' substantive determination that filling these wetlands will have no significant impact on the environment.

record developed in this lengthy environmental review process. MTP-PV does not believe that a point-by-point rebuttal of Petitioners' environmental claims would be appropriate here; suffice it to say that, as the Court of Appeals' opinion makes clear, MTP-PV's plans have been thoroughly vetted and approved by the proper state and local environmental regulators. (*Id.* at 6a n.4). And the Corps did not issue its EA and FONSI until after the concerns expressed about the project by the Environmental Protection Agency, the Fish and Wildlife Service, and the National Marine Fisheries Service – all organizations not known for their timidity in defending the environment and endangered species – were resolved. (*Id.* at 10a-11a).

The Petition also misstates the basis of the Corps' decision and that of the Court of Appeals. Neither held that the Corps, when making FONSI determinations, can or should ignore all environmental impacts caused by activities outside of its regulatory jurisdiction. The Corps has explicit regulations governing when such extra-jurisdictional impacts should be considered, and simply concluded that those regulations were not satisfied on the facts here. The Court of Appeals in turn held that the Corps did not act arbitrarily or capriciously in so concluding.

REASONS FOR DENYING THE WRIT

The Petition does not identify any issue that even remotely merits this Court's attention. The heart of this case is a factual determination by the Corps that the state-regulated upland portions of the Playa Vista development are not dependent upon MTP-PV receiving the federal wetlands permit at issue – and that, therefore, the environmental impacts caused solely by that upland development are not fairly characterized as impacts *of the*

Corps' decision to issue the wetlands permit. The Court of Appeals engaged in a factbound review of the administrative record and properly held that the Corps' action was consistent with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and not arbitrary or capricious. The Court of Appeals did not announce a rule of law or legal standard that is inconsistent in any way with the decisions of this Court or any other Court of Appeals. The conflicts alleged by the Petition are illusory; the cases it cites generally applied the same legal principles as the Court of Appeals in this case, although to very different factual circumstances and often different governing regulations as well.

I. THE COURT OF APPEALS MERELY HELD THAT, IN LIGHT OF THE FACTS REASONABLY FOUND BY THE CORPS, THE CORPS' APPLICATION OF ITS OWN REGULATIONS WAS NOT ARBITRARY AND CAPRICIOUS

Contrary to the Petition's repeated implications, the Court of Appeals did not hold that the Corps need never consider environmental impacts outside the scope of its regulatory jurisdiction when assessing the need for an EIS. The Court of Appeals merely held that the Corps' factual findings were supported by the record, and that the Corps' application of its own regulations governing extra-jurisdictional impacts to those facts was not arbitrary or capricious. MTP-PV believes that a brief summary of the governing law and the decisions below will help to clarify the actual basis of the decisions that this Court is now being asked to review.

NEPA requires federal agencies to prepare an Environmental Impact Statement for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). In determining whether an EIS is necessary, the agency first prepares an EA, which briefly describes the need for, alternatives to, and environmental impacts of, the proposed Federal action. *See* 40 C.F.R. § 1508.9. If the agency determines in a properly issued EA that the proposed Federal action will not significantly affect the environment, it makes a "finding of no significant impact," and the requisite NEPA inquiry ends. *Id.* at § 1508.13. If, however, the agency determines that the proposed Federal action will significantly affect the environment, then it is obligated to prepare a more thorough EIS concerning the project. *See* 42 U.S.C. § 4332(2)(C).

The Corps determined in this case that its proposed "Federal action" (*i.e.*, issuing a Clean Water Act permit to MTP-PV covering approximately 16 acres of wetlands) would not have any significant impact on the environment, and therefore declined to prepare a full EIS. For purposes of that decision, the Corps obviously had to decide which portions of the proposed 1000+ acre, primarily state-regulated Playa Vista development are fairly attributable to the limited federal action it was contemplating.

The Corps *did not* hold that its consideration of environmental impacts was strictly limited to the 16 acres actually subject to its jurisdiction. Instead, the Corps properly applied its own regulations – which provide that in making FONSI determinations it should consider "those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." 33 C.F.R. Part 325, App. B § 7(b)(1). Those regulations explicitly provide that "[t]he district

engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action." *Id.* at Part 325, App. B § 7(b)(2). Those regulations are a manifestly reasonable interpretation of NEPA, as the Ninth Circuit held in *Sylvester v. U.S. Army Corps of Engineers* (*Sylvester III*), 884 F.2d 394, 399 (9th Cir. 1989).[3]

Applying those regulations to the particular facts here, the Corps determined that the upland portion of the Playa Vista Phase I development could occur "regardless of whether this permit application is granted" and was therefore not a product of the Corps' permit action. (Petition at 19a). The Court of Appeals reviewed the administrative record and held that the Corps' factual findings in this regard were amply supported by the record.[4] (Petition at 22a ("It appears that the project

---

[3] To MTP-PV's knowledge, no other federal Court of Appeals has explicitly ruled upon the validity of these regulations as an interpretation of NEPA. However, the regulations largely codified earlier decisions of the Fifth Circuit and the Eighth Circuit holding that the Corps could limit its consideration to those areas of a larger (primarily non-federal) project that fell within its jurisdiction. *See, e.g., Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 273 (8th Cir. 1980); *Save the Bay, Inc. v. U.S. Army Corps of Engineers*, 610 F.2d 322, 327 (5th Cir. 1980).

[4] As the Court of Appeals properly recognized, the District Court was simply asking the wrong question when it focused on the fact that the overall Phase I development could not proceed precisely as planned without the permit. (Petition at 21a-22a). That will always be the case, or the developer would not be seeking the permit. The relevant question is whether the environmental impacts attributable to the upland development could occur whether or not the Corps issued the wetlands

certainly *could* proceed without the permit and, as the Corps notes, is currently proceeding without the permit.")). Acknowledging that the Corps' interpretation of its own regulations is entitled to substantial deference under this Court's decisions, *see Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375-76 (1989), the Court of Appeals then held that the Corps' decision to limit its "significant impact" review to the 16-acre lowland area was, *on the facts of this case*, not arbitrary and capricious. (Petition at 23a).

II. THERE IS NO CONFLICT WITH A DECISION OF THIS COURT

The Petition asserts that the Court of Appeals' decision conflicts with this Court's opinion in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). It does not. If anything, *Robertson* supports the Court of Appeals' decision.

Robertson did not even address when an agency is required to prepare an EIS under NEPA, much less how to draw the appropriate line between the federally regulated and state regulated portions of a large project for purposes of a FONSI determination. *Robertson* involved an exclusively federal project for which an EIS was in fact prepared. The Ninth Circuit had adopted a number of substantive rules about what an EIS must contain, and this Court held that those requirements imposed by the Ninth Circuit were inconsistent with NEPA and failed to give proper deference to the relevant agency regulations. *Id.* at 353-59.

---

permit. The Corps found that they could, and the Court of Appeals properly recognized that that finding is supported by the record.

In the course of its background discussion on the policies supporting NEPA, *Robertson* did observe in dictum that one purpose of an EIS is to discuss the impact of off-site development upon a federal project so that non-federal bodies have "adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner." *Robertson*, 490 U.S. at 350. The Petition seizes on that observation and asserts that "[i]f an agency is required to look at impacts outside its regulatory jurisdiction when preparing an EIS, then certainly it must look outside this jurisdiction when determining whether to prepare an EIS at all." (Petition at 22).

That spare proposition is the lynchpin of the Petition's entire argument, and the Petition does not include a single supporting citation for it – from this Court or any other. That omission is not surprising, because the proposition is in one sense a red herring and in another sense wholly inconsistent with the language and structure of NEPA. It is a red herring because, as discussed above, neither the Corps nor the Court of Appeals has ever suggested that an agency cannot "look at impacts outside its regulatory jurisdiction" when deciding whether a contemplated federal action will have a significant impact on the environment. The Court of Appeals' opinion, and the Corps' regulations, instead properly recognize that impacts outside of the agency's jurisdiction should be considered if, and only if, those impacts are fairly attributable to the contemplated federal action that *is* within the agency's jurisdiction as a factual matter so that "the environmental consequences of the larger project are essentially products of the Corps permit action." 33 C.F.R. Part 325, App. B § 7(b)(2).

Taken any farther than that, the analogy proposed by the Petition is simply inconsistent with the language and

structure of NEPA. Once an agency undertakes to prepare an EIS for a federal project, NEPA and its implementing regulations require the agency to cast a broad net and study possible consequences of later actions by unrelated, non-federal entities so that, as recognized in *Robertson*, those entities will have "adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner." *See Robertson*, 490 U.S. at 350. But the statutory trigger for preparing an EIS under NEPA is a "*Federal* action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (emphasis added). The focus of that trigger is, of necessity, on the agency's own contemplated actions. The statute could not sensibly be read to require the agency to peer any farther into the future when making that initial, threshold determination than the Corps' regulations already require. Doing so would in fact require the preparation of an environmental impact statement before an agency could determine whether its action will require an environmental impact statement – which is, of course, precisely the import of the Petition's circular reasoning.

Nothing in *Robertson* undermines that conclusion. To the extent it is relevant at all, *Robertson* generally supports the Ninth Circuit's decision in this case because this Court in *Robertson* deferred to the federal agency's interpretation of its regulations. The Ninth Circuit below held that the district court erred by not deferring to the Corps in the determination of its scope of review, citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375 (1989), and *Robertson*, 490 U.S. at 359. "Given the deference that the agency's determination of its own jurisdiction is due, the Corps' decision to limit its review to the specific activity requiring the permit is not arbitrary or capricious." (Petition at 23a).

III. THERE IS NO CONFLICT WITH DECISIONS OF OTHER CIRCUITS

Petitioners erroneously contend that the Ninth Circuit's decision in this case conflicts with the holdings of various other Courts of Appeals, particularly the First Circuit's holding in *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985). There is no conflict.

A brief review of *Marsh* reveals that the First Circuit in fact applied essentially the same legal reasoning and principles as the Court of Appeals in this case. In *Marsh*, the Corps and the Federal Highway Administration were considering building a solid-fill causeway to connect a large island in Penobscot Bay, Maine to the mainland, as well as a substantial port facility on that island. The agencies determined that those federal actions would have no significant impact on the environment, in part because they declined to consider evidence that the federal project would enable and encourage the private development of the rest of the island.

The First Circuit reversed. The Court recognized that "agencies need not consider highly speculative or indefinite impacts" of their initial actions when deciding whether to prepare an EIS. *Marsh*, 769 F.2d at 878 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 402 (1976)). In *Marsh*, the First Circuit found, however, that "the record makes it nearly impossible to doubt that building the causeway will lead to further development of Sears Island" and that "the plans for further development are precise enough for an EIS usefully to take them into account." *Id.* at 878-79. Given that the private development plainly would not occur without the federal action, the First Circuit held that the agencies should have considered the likely impact of the planned

private development when deciding whether the federal action would have a significant impact on the environment.

The First Circuit's opinion in *Marsh* is not in any way inconsistent with the Ninth Circuit's analysis in this case. The distinction between the cases is, of course, factual. The heart of the First Circuit's decision in *Marsh* is its factual finding that private development of the island would not occur without the federal causeway, and that such development would certainly occur if the causeway was built. In this case, by contrast, the vast majority of the Playa Vista Phase I project can be built, and indeed a large segment of it had been under construction during the two and a half year duration of the district court's injunction, without the fill of 16.1 acres of federally delineated wetlands. Because the Corps reasonably found that the impact of the upland development in this case would occur whether or not it issued the federal permit, that impact is plainly not attributable to the Corps' decision. Using the rules of law discussed in *Marsh*, the First Circuit would have decided *Wetlands Action Network* in the same manner as did the Ninth Circuit.

Petitioners and the district court's decision place great weight on the fact that a portion of the Phase I project would need to be redesigned in the absence of the Section 404 Permit and that the filling of wetlands would not occur in the absence of the Phase I project. However, this connection is found in every private project requiring a Section 404 Permit, as the Ninth Circuit noted: "If this type of connection alone were sufficient to require a finding that an entire project falls within the purview of the Corps' jurisdiction, the Corps would have jurisdiction over all such projects [requiring permits] . . . ." (Petition at 21a). The critical issue, of course, is not whether the rest of the project would have to change somewhat absent the permit,

but whether it could still proceed in a way that would have the same general anticipated environmental impact even if the permit were denied. As the Corps found and the Ninth Circuit recognized, it is perfectly clear that the upland portion of Phase I of the Playa Vista project could (and did) proceed without significant alteration even in the absence of the federal permit.

Marsh has no rule of law which conflicts with the Ninth Circuit's decision. The Ninth Circuit's decision below rested upon facts that the larger Playa Vista project did not necessarily need the 16.1 scattered acres of wetlands (Petition at 19a-22a), that the state had performed a competent and full environmental review of the project (*id.* at 23a), that the various parts of the project had independent utility (*id.* at 27a), that the FONSI was based upon "relevant and substantial data" (*id.* at 30a), and that the Corps "took a hard look at the environmental consequences" of the project (*id.* at 31a). These are all fact-based issues. The Corps decided that development in the 16.1 acres was not so significant to the 650-acre project as to require an EIS to measure the larger state-approved project impacts. The Ninth Circuit agreed with this decision and properly deferred to the Corps' decision. Given the deference owed to an agency's interpretation of its regulations, this Court should not disturb the Ninth Circuit's decision.

Petitioners also cite *Sierra Club v. United States Forest Service*, 46 F.3d 835, 839 (8th Cir. 1995), and *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168 (3d Cir. 2000), for the proposition that an EA must consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7); *see also* 40 C.F.R. § 1508.7. These decisions and regulations define the

"cumulative impacts" of the project that must be considered in an EA. They do not speak to the prior question of the scope of the project (or "action") itself, which is the issue addressed by the Corps and the Court of Appeals in this case. See 33 C.F.R. Part 325, Appendix B § 7(b).

There are three types of impacts to be studied in an EA or EIS. These three impacts are direct, indirect and cumulative. *See* 40 C.F.R. § 1508.8; *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1176 (10th Cir. 1999).

Direct and indirect impacts are those which relate to the project itself. *See Friends of the Earth, Inc. v. U.S. Army Corps of Engineers*, 109 F. Supp. 2d 30, 36 (D.D.C. 2000) ("Direct impacts encompass those impacts that are 'caused by the action and occur at the same time and place'") (citing 40 C.F.R. § 1508.8(a)); 40 C.F.R. § 1508.8(b) (indirect impacts are "caused by the project").

Cumulative impacts differ from direct and indirect impacts. Cumulative impacts, by definition, are the impacts of other projects combined with the project's direct and indirect impacts. Cumulative impacts include "other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7 (definition of cumulative impacts). There should be no dispute that cumulative impacts require the study of "other projects' potential cumulative environmental impacts in the relevant geographical area." *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 176 (5th Cir. 2000).

The "cumulative impacts" regulations are uncontroversial and were complied with here. The Corps analyzed the cumulative impacts associated with its contemplated action, and the Petitioners did not challenge

the adequacy of that cumulative impacts study. It was exhaustive.[5]

The dispute in this case is not over the adequacy of the Corps' cumulative impacts study under the CEQ regulations, but over whether the Corps properly applied its regulations which determine the scope of the federal project itself for purposes of NEPA review.

That antecedent question is answered by Appendix B of Part 325 of section 33 of the Code of Federal Regulations, which vests discretion with the Corps to determine whether, "the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action." 33 C.F.R. Part 325, App. B § 7(b)(2). The Appendix plainly states that the degree of federal control over the project is the key determinant for the Corps' scoping decision:

> In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of Army (DA) permit . . . which is merely one component of a larger project . . . . The district

---

5 *See* 4 AE 1720 [upland impacts], 1713 [aesthetics], 1714 [traffic], 1715 [energy], 1715 [air quality], 1718 [noise], 1718 [historic properties], 1719 [land use], 1719 [economics], 1720 [water quality]; 6 AR 2808-67 [60-page study]; *see also* backup technical material at Supp. Exc. 2998-3008 [permit notice], 3009 [Caltrans traffic input], 3010-3013 [response to comments to the EPA about cumulative impacts on salt marshes], 3014-3017 [table of contents to report showing studies of cumulative, off-permit area impacts of geology, hydrology, air quality, biological resources, cultural resources, paleontological resources, land use, transportation, noise, aesthetics, public services, socioeconomics]; 3018-3023 [sample of cumulative impacts analysis: air quality], all filed before the Ninth Circuit.

> engineer should establish the scope of the NEPA document (*e.g.*, the EA or EIS) to address the impacts of the specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review. . . . The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action.

33 C.F.R. Part 325, Appendix B § 7(b); *see also Sylvester III*, 884 F.2d at 398-99 (upholding formula of Appendix B and deferring to Corps' decision to limit direct and indirect impact analysis to scattered wetlands filling instead of the larger private ski resort project).

It is not enough to claim cumulative impacts of possible future projects as a means to trigger an EIS. *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 430 (10th Cir. 1996), examined the relationship between cumulative impacts and the need to determine that the project "actions were 'so interdependent that it would be unwise or irrational to complete one without the others.'" (Citation omitted.) It was, as is here, a fact-based examination. In *Airport Neighbors*, an EA was sufficient to study the impacts of a runway upgrade. It was not necessary to use an EIS to study the greater impacts of the future airport master plan because it "would result in 'a gross misallocation of resources, would trivialize NEPA and would diminish its utility in providing useful environmental analysis for major federal actions that truly affect the

environment.'" *Id.* at 431 (citation omitted). All that is necessary is for the EA to identify potential cumulative impacts, and then explain why an EIS is not necessary to consider them further. *See Fritiofson v. Alexander*, 772 F.2d 1225, 1234 (5th Cir. 1985) ("Assuming, arguendo, that the EA's discussion of cumulative impacts is inadequate, the court should have simply remanded the case for reconsideration of those impacts, thus leaving to the Corps the decision whether, when properly evaluated, they mandate preparation of an EIS or whether they can again be considered in an EA.") Significantly, the Corps has discretion under section 1508.25(a)(2) not to require an EIS if the small size of the federal participation justifies this decision.

In this case, it is error to use the sweep required for a cumulative impacts study (*i.e.*, other projects, state, federal and private) as a means to attack the Corps' prior decision as to the scope of the *federal* portion of the project. Rather, the Ninth Circuit here held that it was unnecessary to compel the preparation of an EIS to review non-federal impacts, and that an EA would suffice to analyze the direct, indirect and cumulative impacts of the *federal* project in light of the small footprint of federal jurisdiction. (Petition at 22a-23a).

As explained above, Petitioners' repeated efforts to demonstrate that agencies may sometimes be required to consider environmental impacts outside of their explicit jurisdiction are unnecessary. The Court of Appeals did not hold in this case that such consideration was categorically inappropriate. What the Court of Appeals actually held was that, in the specific context presented here, the Corps' consideration of impacts caused by parts of the project outside of its jurisdiction was guided and constrained by a Corps regulation directly on point, *see* 33 C.F.R. Part 325,

App. B § 7(b), and that the Corps' application of that regulation was not, in light of its reasonable factual findings, arbitrary or capricious.

Petitioners also cite *Vieux Carre Property Owners, Residents & Associates, Inc. v. Pierce*, 719 F.2d 1272 (5th Cir. 1983). The Fifth Circuit's holding is contrary to the position for which it is cited. The Fifth Circuit upheld an agency's decision to focus its review upon a single phase of many phases. *See Vieux Carre*, 719 F.2d at 1278-79. According to the court, "[c]onfronted with a project that had independent utility, the City properly determined that it should be assessed independently of future speculative phases." *Id.* at 1278. That determination, the Fifth Circuit observed, was reasonable and consistent with the court's prior holdings that "'NEPA does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions.'" *Id.* (citation omitted). There is no principle of law in *Vieux Carre* with which the Ninth Circuit's opinion conflicts.

Thus, none of Petitioners' cited decisions conflicts with the Ninth Circuit's decision in this case. They either support, or do not apply to, the Ninth Circuit's decision. To the contrary, the Ninth Circuit's decision squares with a number of other decisions with respect to the specific issue of whether an EA and FONSI will suffice in lieu of an EIS when federal involvement is minimal. *See National Wildlife Fed'n v. Whistler*, 27 F.3d 1341 (8th Cir. 1994) (EA would suffice; the "'relationship required to be considered in determining reasonable and practicable alternatives need not be of such significance as would be necessary to "federalize" the entire project [for NEPA purposes]'" (quoting *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 410 (9th Cir. 1989) (alteration in original));

Sylvester III, 884 F.2d 394 (EA would suffice in lieu of an EIS where the Corps determined that its jurisdiction was only a small component of the larger project).

IV. THERE IS NO CONFLICT WITH THE REGULATIONS

Petitioners rely upon cumulative impacts regulations to briefly argue that the Ninth Circuit's decision conflicts with regulations of the CEQ implementing NEPA. (Petition at 25-27). Petitioners do not explain how the CEQ regulations are inconsistent with the Court of Appeals' decision, or with the Corps' regulations on which that decision is based. Petitioners also do not explain how or where this argument was presented and preserved in the lower courts, in light of its complete absence from the relevant section of the Court of Appeals' opinion.[6] Petitioners also cite no decision of any court that has addressed the issue. To MTP-PV's knowledge, the only federal Court of Appeals to have ruled on the validity of the Corps' regulations is the Ninth Circuit itself. *See Sylvester III*, 884 F.2d at 399. At best, therefore, this issue is novel, splitless, and likely defaulted. It also is not fairly embraced within the Question Presented identified by the Petition.

In any event, as explained above, there is no conflict between the "cumulative impact" regulations and the Court of Appeals' decision, which is based on a different set of regulations that address an antecedent issue. The Corps' decision as to the scope of its review is discussed in Appendix B of section 7(b) of Part 325 of section 33 of the

---

[6] The Court of Appeals did discuss the CEQ regulations in the portion of its opinion that relates to the "segmentation" issue discussed below, but not in the section of its opinion that Petitioners challenge here.

Code of Federal Regulations and section 1508.25 of title 40 of the Code of Federal Regulations. Neither of those sections make cumulative impacts equivalent to the scope of federal jurisdiction. Section 1508.25 merely lists it as one factor to consider. In any event, as discussed above, the EA contained a comprehensive review of the project's cumulative impacts.

The Petitioners mention briefly the issue of segmentation. (Petition at 28). Other than to say that segmentation has been litigated "in dozens of cases," Petitioners do not explain how the Ninth Circuit's decision conflicts with other decisions, or how it is contrary to regulations. The Ninth Circuit found substantial evidence in the record to support the Corps' decision that the Playa Vista project's three phases were not improperly segmented "because each have independent utility and that [the Corps] therefore was not required to consider the environmental impacts attributed to the three different phases in a single NEPA analysis." (Petition at 25a). The Ninth Circuit held that the Corps properly followed section 1508.25.

In summary, there is no conflict with the regulations. The Corps properly determined that the various phases of the entire Playa Vista project were not "connected actions" or "cumulative actions" because they have independent utility. 40 C.F.R. § 1508.25.

V. THERE IS NO IMPORTANT FEDERAL QUESTION

This case does not raise an "important" federal issue. The Corps determined that the 16.1 acres of degraded, scattered wetlands were not of sufficient import to the 650-

acre project as to require an EIS to study the direct and indirect impacts of the larger private project. The Ninth Circuit took comfort with the fact that a state environmental impact report under the California Environmental Quality Act performed the very study Petitioners now demand for an EIS. (Petition at 23a). The Corps determined, and the Ninth Circuit agreed, that the Corps lacked sufficient federal "control and responsibility" over the entire Phase I project. Moreover, the Ninth Circuit's opinion does not conflict with any identified decision of this Court or any other Court of Appeals, and has little precedential value in light of the extremely factbound nature of its analysis.

CONCLUSION

For the reasons stated above, Playa Capital respectfully requests that this Court deny Petitioners' petition for a writ of certiorari.

Dated: June 11, 2001

Respectfully submitted,

Maureen E. Mahoney
J. Scott Ballenger
LATHAM & WATKINS
555 Eleventh Street, N.W.
Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Facsimile: (202) 637-2201

Robert D. Crockett*
Kathleen O' Prey Truman
Kathryn M. Davis
LATHAM & WATKINS
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007
Telephone: (213) 485-1234
Facsimile: (213) 891-8763
* Counsel of Record for Respondent Playa Capital Company, LLC